87 - 2

No. - .

Supreme Court, U.S.
FILED
JUN 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States.

OCTOBER TERM, 1986.

FREDERICK HENRY VAHLSING, JR.,
PETITIONER,

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY
AND WILLIAM M. HOUSTON,
RESPONDENTS.

Petition for Writ of Certiorari to the Maine Supreme Court.

F. H. VAHLSING, JR., Pro se,
for F. H. VAHLSING, JR.,
211A Main Street,
Limestone, Maine 04750.
(207) 325-8828
Counsel for F. H. Vahlsing, Jr.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

I. Whether petitioner was denied his Fourteenth Amendment constitutional right of due process when his complaint was dismissed with prejudice for alleged noncompliance of confusing and ambiguous court orders.

II. Whether petitioner was denied his Fourteenth Amendment constitutional right of due process when his complaint was dismissed with prejudice, where said dismissal was predicated on a state court's refusal to allow petitioner to have claims in his complaint.[1]

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[1] Statement pursuant to Rule 21.1: The parties to the proceedings below were the petitioner, Frederick H. Vahlsing, Jr. and Vahlsing, Inc. and the respondents, Bangor and Aroostook Railroad Company and William Houston.

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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1986.

FREDERICK HENRY VAHLSING, JR.,
PETITIONER,

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY
AND WILLIAM M. HOUSTON,
RESPONDENTS.

Petition for Writ of Certiorari to the Maine Supreme Court.

The petitioner, Frederick H. Vahlsing, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Maine Supreme Court, which was entered in the above-entitled proceeding on March 23, 1987. The Maine Supreme Court denied the motion for reconsideration on March 31, 1987, thus the judgment became final on March 31, 1987 with the Maine Supreme Court.

Opinions Below.

The opinion of the Maine Supreme Court has not yet been reported. It is reprinted in the appendix hereto as Appendix F, *infra* at 15a.

The order of the Maine Superior Court for the County of Aroostook dismissing the case has not been reported. It is reprinted in the appendix hereto as Appendix E, *infra* at 12a.

Jurisdiction.

The petitioner commenced suit in the Superior Court for the County of Aroostook, Maine on November 5, 1985, when he joined in an amended complaint filed by Vahlsing, Inc. The Superior Court entered its decision on August 19, 1986.

The petitioner timely appealed to the Maine Supreme Court. The Maine Supreme Court issued its decision March 23, 1987. A timely motion for reconsideration was filed with the Maine Supreme Court. The Maine Supreme Court denied the motion for reconsideration on March 31, 1987.

The jurisdiction of this Court to review the judgment of the Maine Supreme Court is invoked under 28 U.S.C. § 1257 (C).

Statute Involved.

This case requires the interpretation of the Fourteenth Amendment to the Constitution "nor shall any state deprive any person of life, liberty or property without due process of law."

Statement of the Case.

Petitioner Frederick H. Vahlsing, Jr. was at all relevant times herein President of Vahlsing, Inc. Vahlsing, Inc. is a corporation duly organized and existing under the laws of the State of Delaware, licensed to do business in the State of Maine. Vahlsing, Inc. and Frederick H. Vahlsing, Jr. in his capacity as President of Vahlsing, Inc. filed a complaint on or about March 18, 1985, in the Maine Superior Court for the County of Aroostook against the Bangor and Aroostook Railroad Company, Bangor Investment Company and William M. Houston.

On July 25, 1985, the Superior Court dismissed all claims against Bangor Investment Company and all claims brought by Frederick H. Vahlsing, Jr. *individually*, notwithstanding the fact that the petitioner brought his claims solely in his capacity as President of Vahlsing, Inc. In addition the court stated "the plaintiff *is* to amend *his* complaint . . . concisely stating *its* cause of action." Court order July 25, 1985, (emphasis added) (see Appendix A at 2a).

The ambiguity of the Superior Court's July 25, 1985 order as to precisely what capacity, if any, the petitioner could continue the action prompted Mr. Vahlsing, in his individual capacity, to join in with Vahlsing, Inc. in an amended complaint filed by Vahlsing, Inc. The complaint of Mr. Vahlsing, individually and the amended complaint of Vahlsing, Inc. was filed with the Superior Court on or about November 5, 1985.

The trial court subsequently ruled on or about March 18, 1986 that "the plaintiffs *are* to again review this court's order of July 25, 1985 and to file an amended complaint within thirty days that complies with said order, without adding any new claims." (Emphasis added) (see Appendix B at 3a.)

The Superior Court on or about March 31, 1986 refused the petitioner's request to clarify the ambiguous court orders of

July 25, 1985 and March 18, 1986 (see Appendix C at 4a). The Maine Supreme Court on or about May 16, 1986 dismissed an appeal timely filed by the petitioner requesting clarification of the lower court's July 25, 1985, and March 18, 1986 orders. The Maine Supreme Court dismissed the appeal as not being an appeal of a final judgment or order (see Appendix D at 5a). Neither Vahlsing, Inc. nor the petitioner filed a second amended complaint as neither Vahlsing, Inc. nor the petitioner had been given a clarification of either the July 25, 1985 or March 18, 1986 orders. Mr. Vahlsing at the August 19, 1986 hearing before the Superior Court for the County of Aroostook presented the constitutional issue of whether his due process rights were violated:

> "In addition, my confusion also is somewhat there concerning the last paragraph of your order of July 25, 1985 in connection with, and I should like to read if I may, quoting, 'And dismissing all claims of F. H. Vahlsing Junior individually.' Now, my confusion stems that I was not a party to that original complaint and I just wonder is it within the Court's jurisdiction to dismiss all claims against a party individually when he's not part of the complaint."

Vahlsing, Inc., et al., v. *Bangor and Aroostook Railroad, et al.* Superior Court hearing, August 19, 1987 (Appendix C at 9a). The Superior Court on or about August 19, 1986 dismissed with prejudice the petitioner's cause of action for his non-compliance with the March 18, 1986 order (see Appendix E at 12a). This dismissal with prejudice order was timely appealed to the Maine Supreme Court. The petitioner in his Brief and Motion for Reconsideration to the Maine Supreme Court (see Appendix G at 23a) reasserted the due process concern of allowing

the extreme remedy of dismissal with prejudice, given the Superior Court's confusing orders of July 25, 1985 and March 18, 1986:

> "Is it the position of this Honorable Court that a lower court can issue Orders which are confusing and thus affirm an extreme sanction of dismissal with prejudice against the appellants, Vahlsing, Inc. and F. H. Vahlsing, Jr. for not complying with a confusing Order? Appellants believed that they complied with their interpretation of the confusing Order dated July 25, 1985 prior to the issuance by the Superior Court of Aroostook County of a second Order on March 18, 1986, which referred back to the confusing Order of July 25, 1985."

Motion for Reconsideration (Appendix G at 25a). The Maine Supreme Court on March 23, 1987, affirmed the lower court's decision stating the dismissal was within the trial court's discretion (see Appendix F at 15a). The Maine Supreme Court denied the petitioner's timely motion for reconsideration on March 31, 1987 (see Appendix H at 30a).

Reasons for Granting the Writ.

I. THE MAINE SUPREME COURT'S AFFIRMANCE OF THE DISMISSAL WITH PREJUDICE OF THE PETITIONER'S COMPLAINT IS A GROSS VIOLATION OF PETITIONER'S RIGHT OF DUE PROCESS WHERE DISMISSAL WAS BASED ON ALLEGED NONCOMPLIANCE OF CONFUSING AND AMBIGUOUS STATE COURT ORDERS.

The Maine Supreme Court decision affirming the Superior Court's dismissal with prejudice as being within the allowable

scope of judicial discretion elevated procedural technicalities above the constitutional demands of due process. The court's ability to dismiss an action in order to ensure the proper administration of justice is not questioned. (See *Landis* v. *North American Co.*, 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936).) However this power must be tempered with the requirements of due process. *Hovey* v. *Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897). It is this limitation of judicial discretion that demands this Court's attention. This Court needs to firmly address the due process limitation on a state court's discretion to dismiss a case at the pleading stage, given the trial court's inability to articulate clearly its orders to the parties involved. The sole use of abuse of judicial discretion analysis, where dismissal with prejudice occurs at the pleading stage of the litigation is constitutionally inadequate.

This Court has previously recognized that constitutional limitations upon state court proceedings exist. The Fourteenth Amendment has long been viewed as insuring that state judicial proceedings are fair. *Lassiter* v. *Department of Social Services of Durham County, North Carolina*, 452 U.S. 18, 101 S.Ct. 2153, 61 L.Ed.2d 640 (1981). This Court should now extend the constitutional requirement of due process to the pleading stages of state court proceedings. The Maine Supreme Court by affirming the dismissal with prejudice of petitioner's complaint, in light of the lower court's inability to articulate clearly its pleading requirements indicates a clear absence of due process as required by the Fourteenth Amendment.

In analyzing the principles underlying the Federal Rules of Civil Procedure, this Court stated that the Federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. *United States* v. *Hougham*, 364 U.S. 310, 81 S.Ct. 13, 5 L.Ed.2d 8 (1960); *Maty* v. *Grasselli*

Chemical Co., 303 U.S. 197, 58 S.Ct. 507, 82 L.Ed. 745 (1938); 3 Moore's Federal Practice 15-11 (n. 1) (1985). The facts of the instant cases clearly illustrate that the Maine approach to procedural rules is more akin to a game of skill. Mr. Vahlsing initially brought his complaint solely in his capacity as President of Vahlsing, Inc. The Maine Superior Court on July 25, 1985 dismissed all of Mr. Vahlsing's claims in his capacity as an individual, not his corporate officer capacity as pled. The court further ordered "the plaintiff is to amend *his* complaint . . . concisely stating *its* cause of action." (Emphasis added.) "Vahlsing, Inc. et al. v. Bangor and Aroostook Railroad Company et al." court order July 25, 1985 (see Appendix A at 1a). The petitioner in his attempt to satisfy the Superior Court's July 25 ruling filed a complaint in conjunction with the Vahlsing, Inc. amended complaint on November 5, 1985. The July 25 order clearly indicates only one of the two plaintiffs is allowed to bring an amended complaint. However at best it is unclear as to which plaintiff the court is referring to, Vahlsing, Inc. or Frederick H. Vahlsing, Jr., President of Vahlsing, Inc. The lower court on March 18, 1986, ordered both the plaintiffs to comply with the previous July 25, 1985 order with the expressed limitation not to present any additional claims. This second order merely served to compound the confusion and ambiguity already present by the issuance of the previous order. The court expressly refused to clarify the obvious ambiguity on March 31, 1986.

The two orders taken together with the court's refusal to clarify do not provide constitutionally sufficient notice to the petitioner to warrant a dismissal with prejudice. "When it has been established that failure to comply (with court discovery orders) has been due to inability and not to willfulness, bad faith or any fault of (the disobedient party) the harshest sanction of dismissal is improper." *United States* v. *Sumitomo Marine & Fire Insurance Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980).

See *Societe Internationale Pour Participations Industrielles et Commerciales S.A.* v. *Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). This Court has held that a willful and knowing failure to comply with a pretrial discovery order is constitutionally sufficient basis to render a default judgment against a party. "The preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxities de Guinee*, 456 U.S. 694, 705, 102 S.Ct. 2099, 2106 (1982); *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 350, 351, 29 S.Ct. 370, 380 (1909).

As the above cases illustrate, the due process clause when applied to noncompliance with court discovery orders, requires bad faith or knowing disregard of the court order. The petitioner could not be held to knowingly disregard the state court's order, given the July 25, 1985 and March 18, 1986 orders lack of clarity, coupled with the Superior Court's explicit refusal to clarify its order. This Court should extend the due process fairness doctrine of the Fourteenth Amendment to state court pleading requirements. The exclusive use of abuse of judicial discretion doctrine is inconsistent with necessary constitutional safeguards. The Court should grant certiorari to review this important constitutional point.

II. The Maine Supreme Court's Affirmance of the Dismissal of the Petitioner's Cause of Action With Prejudice Was a Gross Violation of Petitioner's Rights of Due Process As Guaranteed By the Fourteenth Amendment, Where Said Dismissal Was Predicated On a State Court's Refusal To Allow Petitioner To File Claims In His Complaint.

The Maine Superior Court dismissed the petitioner's cause of action solely on the basis of petitioner's noncompliance

with its March 18, 1986 order, assuming without admitting that said order required the petitioner to submit a second amended complaint without including any additional claims. This limitation in the clear absence of any prejudice to the opposing party is a clear violation of petitioner's due process rights as guaranteed by the Fourteenth Amendment to the Constitution.

This Court has recognized that constitutional limitations upon state court proceedings exist. The Fourteenth Amendment has long been viewed as insuring that state judicial proceedings are fundamentally fair. *Lassiter* v. *Department of Social Services of Durham County, North Carolina*, 452 U.S. 18, 101 S.Ct. 2153 (1981) "applying the due process clause is therefore an uncertain enterprise which must discover what fundamental fairness consists of in a particular situation by first considering any relevant precedent and then addressing the several interests at stake." *Lassiter* at 24, 25.

This Court should impute this due process requirement to state pleading requirements. In the absence of undue prejudice to the opposing party, fundamental fairness dictates that a party filing a complaint be allowed to bring causes of action. "Pleadings are not an end in themselves but are only a means to the proper presentation of a case; that at all times they are to assist, nor deter, the disposition of litigation on the merits." 3 Moore's Federal Practice 15-11 (1985); *Conley* v. *Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80, 85 (1957). This Court should extend the due process fairness requirement to pleadings in order to effectuate the proper role of pleadings in litigation. Constitutional due process dictates that controversies be resolved through a trial on the merits, rather than on procedural technicalities. The Federal rules embody this spirit. The courts have not been hesitant to allow amendments for the purpose of presenting the real issues of the case, when the moving party has not been guilty of bad faith and is not acting for the

purpose of the delay, the opposing party will not be unduly prejudiced and the trial of the issues will not be unduly delayed. *Foman* v. *Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); 3 Moore's Federal Practice 15-47-48 (1985). This Court should ground this spirit in constitutional terms.

The Maine Superior Court's demand for a more restrictive complaint in the clear absence of any prejudice to the opposing party is contrary to the constitutional concept of fundamental fairness, and a violation of the petitioner's due process rights. This Court should limit this extreme judicial discretion through the application of constitutional safeguards. The Maine procedural rules allow for excessive and unconstitutional permitted technical resolutions. This Court should grant certiorari in order to examine the question of due process limitations on state courts to discretionary pleading requirements.

Conclusion.

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

/s/ F. H. Vahlsing, Jr.

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Appendix H
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Appendix A.

STATE OF MAINE
AROOSTOOK, ss.

SUPERIOR COURT
CIVIL ACTION,
Docket No. CV-85-77

VAHLSING, INC., a corporation duly organized and existing under the laws of the State of Delaware, licensed to do business in the State of Maine and its President, F. H. Vahlsing, Jr.,
Plaintiffs

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, a Maine corporation; BANGOR INVESTMENT COMPANY, a Maine corporation; and WILLIAM M. HOUSTON, an individual and citizen of the State of Maine,
Defendants

ORDER

This cause came on for hearing, and was argued by counsel, upon the motion of the plaintiffs for summary judgment and defendants' motion for summary judgment.

1. Defendants' motion is granted as to plaintiffs' claims resulting from the testimony of William Houston, before the Maine Board of Environmental Protection, as such testimony was privileged and unavailable as a basis for a cause of action based upon defamation.
2. Motion *denied* as to the action in fraud against the Bangor and Aroostook Railroad Company and William Houston.

3. The Court dismisses all actions again the Bangor Investment Company as no cause of action is stated nor supported by any of the pleadings.
4. While it is not clear from the pleadings whether the plaintiff F. H. Vahsling, Jr. (President of Vahlsing, Inc.) is bringing this action in his capacity as president, and therefore in a corporate capacity, or as an individual, the Court dismisses all claims of F. H. Vahlsing, Jr. brought in his individual capacity. The remaining pleadings in fraud state no cause of individual action by F. H. Vahlsing, Jr.

In view of the Court's order on the defendants' motion for summary judgment dismissing all actions of defamation against the defendants, and dismissing all claims against the Bangor Investment Company, and dismissing all claims of F. H. Vahlsing, Jr., individually, the plaintiff is to amend his complaint, without the necessity of attaching exhibits already filed with the Court, *clearly* and *concisely* stating its cause of action against the defendant Bangor and Aroostook Railroad and William M. Houston individually. In view of the voluminous pleadings and the plethora of exhibits filed with the Court in this matter, coupled with the ambiguity of some of the plaintiffs' stated causes of actions, both the plaintiffs and the defendants are given leave to file further motion for summary judgment, after the Court has received plaintiffs' amended complaint and defendants' amended answer.

Dated: July 25, 1985

/s/ Paul T. Pierson

Paul T. Pierson
Justice, Superior Court

Appendix B.

3/18/86. The plaintiffs are to again review this Court's order of July 25, 1985 and to file an amended complaint within 30 days that complied with said order, *without* adding any new claim. Failure to comply with this 2nd order will result in dismissal of plaintiffs' complaint. Costs are awarded to the defendant in the amount of $250 to be paid by the plaintiff.

AROOSTOOK COUNTY
Robert R. Rush, CLERK
NOV 22 1985
FILED & ENTERED
SUPERIOR COURT

Appendix C.

3/31/86 — Request denied. Request for findings of fact not in order. Additionally, the orders of July 25, 1985 and March 18, 1986 are not ambiguous and clearly define pl's further obligations in this action. P.D.P.

Appendix D.

STATE OF MAINE
AROOSTOOK, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. Aro-86-170

VAHLSING, INC., ET AL.)
)
vs.) ORDER
)
BANGOR AND AROOSTOOK)
RAILROAD COMPANY, ET AL.)

Upon motion of appellees to dismiss the appeal,

It is ORDERED that the motion be, and it hereby is, GRANTED. The appeal is hereby DISMISSED.

Dated this sixteenth day of May, 1986.

For the Court,

/s/ J. McKusick

Chief Justice

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MAY 16 1986
Supreme Judicial Court

AROOSTOOK COUNTY
ROBERT R. RUSH, CLERK
MAY 19 1986
FILED & ENTERED
SUPERIOR COURT

Appendix E.

STATE OF MAINE
AROOSTOOK, ss.

SUPERIOR COURT
CIVIL ACTION,
DOCKET # CV-85-77

VAHLSING INCORPORATED, ET AL.

VS

BANGOR AND AROOSTOOK RAILROAD, ET AL.

HEARD BEFORE: JUSTICE PAUL PIERSON
AUGUST 19, 1986
CARIBOU SUPERIOR COURT

APPEARANCES

BRUCE BILLINGS, ESQ., Representing The Plaintiff.
ROGER PUTNAM, ESQ., Representing The Defendant.

MILDRED SWETT
COURT REPORTER

[2] August 19, 1986

COURT: This is the matter of Vahlsing Incorporated et al versus B and A Railroad Company et al. Docket Number CV-85-77, a motion to dismiss amended complaint.

MR. PUTNAM: Your Honor, at this particular point in time we filed a motion to dismiss and think it should be with prejudice. I call the Court's attention to the fact that Vahlsing attempted to appeal your last order and the Law Court dismissed it as premature. They have not offered any amendment to the complaint in accordance with Your Honor's two opportunities and if they want to review that situation it seems to me that a dismissal with prejudice would give them the opportunity to take it to the Law Court and have their day up there if that's what they want. We have seen no amendment whatsoever and the time has long since gone by.

MR. BILLINGS: Your Honor, in conjunction with your order of July 25, an amended complaint was filed November 2, 1985. We felt it was totally complete and we did go to Law Court with it and they dismissed that because the matter had not been finally adjudicated. In the amended complaint filed F.H. Vahlsing Junior as President of Vahlsing Inc. was left out, the Bangor Investment Company was left out, the claim in connection to Mr. Huston as to his privileged testimony was left out and deferred to the matters that [3] had gone on prior to the actual hearing which he submitted evidence back in October of that year. We did go ahead and include F.H. Vahlsing Junior individually which he's here to explain to you in the interest of judicial economy and duplication of effort, rather than file an individual suit that the matters were all intertwined and felt it best to combine. We did not file a second amended complaint because we felt this would further confuse the matter and also you will note there was no furher Exhibits filed. We relied on those filed in the original complaint. There

is some confusion in your order, sir, as to plaintiff versus plaintiff, as to the $250.00 cost. In your order of the 25th you mentioned on the second page, "Plaintiff is to amend his complaint and then clearly and considely stating its cause of action." There is some confusion there.

COURT: What confusion?

MR. BILLINGS: We're not sure who's to pay the $250.00 involved. Frankly, we felt that we complied totally with your request for an amended complaint. It's a very complicated matter. There is a lot riding on it and we have attempted to modify it to your request.

COURT: Everything you have argued so far relates to my original order dated July 25, 1985 and all of your arguments relate to the merits of that order. In March 18, 1986 there was another court order to order you to file an [4] amended complaint. You were telling me you complied with my first order and did not think the compliance with the second order was necessary.

MR. BILLINGS: We felt we covered it all in the first place, sir.

COURT: Then what you are telling me is the second order is only a matter of law and as Mr. Putnam suggested if the Law Court can determine that, it would be appropriate.

MR. BILLINGS: I believe that's correct.

COURT: Mr. Vahlsing, do you have anything individually?

MR. VAHLSING: Yes, I do, Your Honor. I represent F.H. Vahlsing individually and I should like to point out, Your Honor, that the original complaint which was the subject of your order of July 25, 1985 did not contain F.H. Vahlsing Junior individually. Plaintiffs were Vahlsing Incorporated and it's President, F.H. Vahlsing Junior. Mr. Billings has stated to you, Your Honor, in connection with his amended complaint pursuant to your order of July 25, 1985, Mr. Billings eliminated F.H. Vahlsing Junior as President of Vahlsing Incorporated

of the amended complaint. In connection with the amended complaint F.H. Vahlsing Junior individually, as plainly set forth on the front cover of the amended complaint, joined in the complaint with Vahlsing Incorporated. **[5]** The confusion that I have in my mind, Your Honor, and I hope you will bear with me, is in connection with your order of July 25, 1985. Item 4 speaks somewhat of the Court's confusion, if I may say so, and the Court issued a ruling under paragraph 4 against F.H. Vahlsing Junior individually in connection with the original complaint when F.H. Vahlsing Junior individually was not a party of the original complaint. In addition, my confusion also is somewhat there concerning the last paragraph of your order of July 25, 1985 in connection with, and I should like to read if I may, quoting, "And dismissing all claims of F.H. Vahlsing Junior individually." Now, my confusion stems that I was not a party to that original complaint and I just wonder is it within the Court's jurisdiction to dismiss all claims against a party individually when he's not part of the complaint.

COURT: Mr. Vahlsing, the reason for my confusion was because your complaint heading did not include F.H. Vahlsing as an individual and a party to the action but the complaint you filed wiht this Court and you signed requests the following relief and I will read, "The court order judgment against the B and A Railroad for the amount of $10,000,000.00 for damage to F.H. Vahlsing Junior's name and family. B and A Railroad be ordered to hold harmless F.H. Vahlsing Junior for any and all claims by the Department of Environmental Protection, the State of Maine, against F.H. **[6]** Vahlsing Junior. B and A Railroad be ordered to pay any and all costs, expenses incurred by F.H. Vahlsing Junior in defending himself pursuant to any and all claims of the Department of Environmental Protection, State of Maine, against F.H. Vahlsing Junior. The Court grant F.H. Vahlsing Junior all other relief which they deem appropriate. The Court order judgment against Bangor Investment

Company in the amount of $10,000,000.00 for damage against F.H. Vahlsing Junior name and family. Bangor Investment be ordered to hold F.H. Vahlsing Junior for any and all claims made by the Department of Environmental Protection be held harmless. Bangor Investment be ordered to pay all costs, expenses incurred by F.H. Vahlsing Junior in defending himself pursuant to any and all claims. The Court grant F.H. Vahlsing Junior all other relief that the Court deems just and proper." Doesn't that sound like an individual personal claim?

MR. VAHLSING: Yes, Your Honor, but—

COURT: Answer my question. Is that a personal claim?

MR. VAHLSING: Pursuant to Vahlsing Incorporated with indemnity agreement, it's officers.

COURT: Answer my question. It's a very simple question, Mr. Vahlsing. Is that a personal claim or not?

MR. VAHLSING: It's a claim, Your Honor.

COURT: Is it a personal claim? That's the question.

[7] MR. VAHLSING: It's a claim by F.H. Vahlsing Junior as President of Vahlsing Inc. pursuant to the indemnity agreement that Vahlsing Inc. has on file in its minute book and the Security Exchange Commission which has to be brought in that manner. F.H. Vahlsing Junior as President was bringing that claim for compensation to F.H. Vahlsing Junior.

COURT: Well, your complaint was confusing and I simply ordered that it be cleared up. The second complaint was just as confusing and added more claims. You haven't complied with the second order. Mr. Billings has agreed the only way to have the appropriateness of my first order tested is to have the Law Court review that and he's agreed that should be done and the only way that can be done is by the granting of the motion to dismiss your case.

MR. VAHLSING: Well, Your Honor, I am a separate emnity from Mr. Billings and I do not agree with Mr. Billings' ascertation. F.H. Vahlsing individually was not a party to the

original complaint. F.H. Vahlsing individually was a party to the amended complaint. I agree there could be some confusion but the claim in the original complaint was based upon the indemnity agreement which Vahlsing Inc., a public corporation, of approximately 300 shareholders has with its officers and directors. The complaint was brought by F.H. **[8]** Vahlsing Junior as President of Vahlsing Inc. and the claim to which it is to be paid. The payment of the claim is to be paid to F.H. Vahlsing Junior pursuant to the indemnity agreement. Now, the Court has said there are a lot of Exhibits that we put in in connection with the original complaint. This is not a simple matter. It's a complex matter and possibly Vahlsing Inc. should have put in the indemnity agreement which is on file with the Security Exchange Commission and has been, in fact, for over 20 years. I will be happy to forward the indemnity agreement to the Court. But in connection with the amended complaint we were specifically ordered not to put in anymore Exhibits nor put in anymore claims. It's a confusing order, Your Honor, to the effect that I joined with that second complaint as F.H. Vahlsing Junior individually. I did not come in pursuant to the indemnity agreement. I came in directly and individually in order to assist the Court in any confusion that may have arisen. There's a lot of damage here, Your Honor, and a lot of personal injury that's gone on and a lot of these parties have gone to tremendous expense and tremendous personal harassment and problems based on these actions of certain individuals. As you know the civil action of the DEP has been dismissed with respect to F.H. Vahlsing Junior and has been dismissed in connection with Vahlsing Incorporated. In both cases the appeals were sustained. I'm sure you know that is **[9]** true. I can supply the Court with a copy of that. The appearance of F.H. Vahlsing Junior individually in the amended complaint was for the sole purpose to clear up the Court's confusion because if a director or officer of a company

is subject to tort in the form of personal damages he brings that in the name as an officer of the court and the claim was made payable to F.H. Vahlsing Junior.

COURT: Mr. Vahlsing, I made an order. You did not comply with the order. Your efforts to assist, to clarify the confusion, were governed by an order of the Court. You elected not to comply with that order of the Court and you can certainly have your election tested by the Supreme Court. The motion to dismiss is granted with prejudice.

END OF MOTION

CERTIFICATION

I HEREBY CERTIFY THAT the foregoing is a true and accurate transcript of my stenographic notes taken at the Motion in the case of Vahlsing Incorporated vs Bangor and Aroostook Railroad.

/s/ Mildred Swett

MILDRED SWETT
COURT REPORTER

8/19/86 — Motion to dismiss with prejudice is granted on amended complaint filed in accordance to its order of 3/18/86 P.D.P

Appendix F.

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 4389
Law Docket No. Aro-86-378

VAHLSING, INC. et al.

v.

BANGOR AND AROOSTOOK RAILROAD CO. et al.

Argued March 6, 1987
Decided March 23, 1987

Before NICHOLS, ROBERTS, and GLASSMAN, JJ.

MEMORANDUM OF DECISION

Vahlsing, Inc. and F. H. Vahlsing, Jr. appeal the dismissal of their complaint by the Superior Court, Aroostook County for failure to comply with a court order. Reviewing the record in a light most favorable to the plaintiffs, we conclude that the dismissal of the plaintiffs' complaint was within the scope of the trial court's discretion. *See Reeves* v. *Travelers Insurance Companies*, 421 A.2d 47, 50-51 (Me. 1980).

The entry is:

Judgment affirmed.

/s/ All concurring.

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NOTICE: This opinion is subject to formal revision before publication in the Maine Reporter. Readers are requested to notify the Reporter of Decisions, Box 368, Portland, Me. 04112, of any typographical or other formal errors before the opinion goes to press.

Shirley H. REEVES

v.

TRAVELERS INSURANCE COMPANIES et al.

Supreme Judicial Court of Maine

Argued Sept. 15, 1980.
Decided Oct. 15, 1980.

. . . . . .

Abbott J. Reeves (orally), Old Orchard Beach, for plaintiff.

Preti, Flaherty & Beliveau, Jonathan S. Piper (orally), John Flaherty, Portland, for Travelers Ins. Companies.

Hunt, Thompson & Bowie, James M. Bowie (orally), Portland, for Lloyd's, London, England, Jefferson Ins. Co. and American Home Assurance Co.

Before McKUSICK, C.J., and WERNICK, GODFREY, NICHOLS and ROBERTS, J.J.

McKUSICK, Chief Justice.

Plaintiff Shirley H. Reeves[1] appeals from the Superior Court's dismissal with prejudice of her action against four insurance companies because of her failure to comply with a pretrial order, M.R.Civ.P. 16(d)[2] We find that the Superior

[1] Shirley H. Reeves sued in her capacity as administratrix of the estate of Minna C. Reeves. Her complaint alleged that as such she contracted with defendants for insurance and had suffered losses from wind damage.

[2] Prior to September 1, 1980, M.R.Civ.P. 16(d) read as follows:

> (d) Sanctions. If a party fails to comply with the requirements of this rule or any order made hereunder, the court may impose upon the party or his attorney or both such penalties and sanctions as the circumstances warrant, which may include the dismissal of the action or any part thereof with or without prejudice, the default of a party, the exclusion of evidence at the trial, and the imposition of costs including attorney's fees and travel.

By amendment effective September 1, 1980, the permissive "may" was changed to "shall" and the following sentence was added to Rule 16(d):

> The court may expressly order, where appropriate in its discretion, that the costs of such sanctions be borne by counsel and that they shall not be passed on to counsel's client.

Court acted well within the scope of its permissible discretion, and accordingly we deny the appeal.

The complaint, filed on August 1, 1975, alleging the existence of an insurance contract between plaintiff Reeves and the four defendant insurers,[3] sought to recover for damage to rental real estate at Old Orchard Beach allegedly suffered in a windstorm in May or June, 1975. As later amended, the complaint claimed damages for repair, replacement, materials, and labor in the amount of $1,940 and for loss of earnings and rent in the amount of $1,175.

On June 15, 1979, the Superior Court on its own motion dismissed the action under the two-year rule of M.R.Civ.P. 41(b)(1). At that time the docket showed no entry more recent than November 1, 1976.

On June 23, 1979, a different justice of the Superior Court, pursuant to M.R.Civ.P. 60(b), granted plaintiff's motion for relief from the Rule 41(b)(1) dismissal of June 15, 1979, and at the same time denied defendants' Rule 41(b)(2) motion to dismiss for want of prosecution and ordered that the case be brought to trial "as swiftly as practicable."

A pretrial conference before a third Superior Court justice was held on September 4, 1979. His pretrial order expressly stated that the case was not to be set on the jury trial list "until after documentation and amended pretrial memos as below. *Plaintiff to supply Defendants with copies of bills within 90 days* (plus some testimonial augmentations and expansions)." (Emphasis added)

The Advisory Committee's Notes to that amendment of Rule 16 (July 14, 1980) in section 10 make clear the draftsmen's intent that the Superior Court should, under the recently rewritten Rule 16, make greater use of Rule 16(d) sanctions as appropriate, rather than less.

[3] The action as against Jefferson Home Insurance Company of New York and two other insurers was dismissed on October 6, 1975, for insufficiency of service of process. Proper returns of service upon them were finally filed on August 27, 1979, and those defendants were restored as parties.

Neither plaintiff nor her counsel did anything whatever to comply with the September 4, 1979, pretrial order. After a hearing held on February 7, 1980, a fourth Superior Court justice dismissed plaintiff's action with prejudice pursuant to M.R.Civ.P. 16(d). The justice found

> that compliance with order of pretrial has not been had and failure thereof is not the result of excusable neglect when viewed in the light of the history of this case and upon assertion by plaintiff that "documentation" as ordered by the court is not known as to availability and may be determined only be discovery should defendants so wish to pursue that course . . . .

That dismissal is now before us on appeal.

The purpose of the pretrial conference is "to make the other procedures of the rules effective tools in the preparation for efficient and speedy trial of the case." 1 Field, McKusick and Wroth, *Maine Civil Practice* § 16.1 at 317 (2d ed. 1970). To achieve that purpose, counsel must be prepared for the pretrial conference and must act diligently to meet the obligations that result from it. Because judicial economy is such an important goal of the pretrial conference, M.R.Civ.P. 16(d) confirms the inherent power of the court "to enforce the provisions of the rule aimed at making pretrial procedure effective, including not only appearance at the conference, but also the basic requirements of the memorandum and preparation for the conference." *Id.*, § 16.6 at 328.

Although in this case the Superior Court rested its decision to dismiss plaintiff's case with prejudice on M.R.Civ.P. 16(d), it was imposing a sanction for noncompliance with a discovery order, and its action may equally find support in M.R.Civ.P.

37(b)(2).[4] The discovery rules (M.R.Civ.P. 26 through 37) are informed by a philosophy of litigation similar to that governing the pretrial conference. "[P]rior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged." 8 Wright & Miller, *Federal Practice and Procedure* § 2001 at 15 (1970). It is the purpose of both the discovery rules and the pretrial conference to eliminate the sporting theory of justice, *Tiedman* v. *American Pigment Corp.*, 253 F.2d 803, 808 (4th Cir. 1958), and to enforce full disclosure. Meaningful pretrial conferences and liberal discovery are two of the principal devices available to effectuate the purpose of the Maine Rules of Civil Procedure "to secure the just, speedy and inexpensive determination of every action." *See* M.R.Civ.P. 1. Conduct of counsel or his client that frustrates the beneficent purposes of Rule 16 and of discovery orders must be appropriately penalized.

[1] An appellate court reviews the propriety of a sanction under M.R.Civ.P. 16(d) or 87(b)(2) by an "abuse of discretion" standard. Thus, the Superior Court's dismissal of the present action must stand unless an abuse of discretion is shown or there is an error of law. *Lerman* v. *Inhabitants of City of Portland, Me.*, 406 A.2d 903, 904 (1979). In the language of the United States Supreme Court, with appropriate adaptation, "[t]he question, of course, is not whether [the Law] Court . . . would as an original matter have dismissed the action; it is whether the [Superior] Court abused its discretion in so doing."

---

[4] M.R.Civ.P. 37(b)(2) provides in pertinent part:

> If a party . . . fails to obey an order to provide . . . discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . . . .
>
> (C) An order . . . dismising the action or proceeding or any part thereof
>
> . . . .

See 1 Field, McKusick and Wroth, *Maine Civil Practice* § 37.4 (2d ed. 1970).

National Hockey League v. *Met. Hockey Club*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed.2d 747 (1975).

[2, 3] In exercising its discretion under Rule 16(d) or 37(b)(2), the trial court must answer three questions: (1) whether to impose a sanction; (2) upon whom — party or counsel or both — to impose the sanction; and (3) what sanction to impose. The answers to those questions depend upon the circumstances of the particular case, viewed in the light of the functions intended to be served by sanctions. In addition to penalizing noncompliance with a court order and trying to remedy the effect of the noncompliance by compensating the innocent party for the costs incurred therefrom or by extracting compliance from the recalcitrant party, the sanction selected should also serve as a deterrent to similar conduct by the same offender or others. *See* Note, "The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions," 91 Harv.L.Rev. 1033, 1034 (1978). The ultimate goal of any pretrial sanction is to promote fair and efficient litigation, both in the pending case and in the court system generally. Faced with the increasingly heavy demands upon limited judicial resources, all courts are more conscious than ever of the necessity for strict enforcement of their procedural orders. *Id.* at 1055. An appellate court will not lightly overrule a trial court's judgmental choice of an appropriate sanction under Rule 16(d) or 37(b)(2).

[4] On the facts now before us, the February, 1980, dismissal clearly did not represent any abuse of discretion. On appeal, plaintiff's counsel does not question the Superior Court's statement of fact that counsel asserted at the February, 1980, hearing that he, even at that late date, did not know whether there existed documentation such as had been ordered to be produced. Indeed, at oral argument before this court counsel still would not answer the question with any certitude. We emphatically reject plaintiff's contention that defendants, during the 90 days subsequent to the pretrial order, should have pursued

plaintiff to get the ordered documentation or find out whether any existed. Defendants were not required to make any request for the documentation; they already possessed a court order requiring plaintiff to produce it.

[5] Furthermore, the Superior Court, contrary to plaintiff's contention on appeal, committed no error of law in viewing plaintiff's noncompliance with the pretrial order "in the light of the history of this case." For 32 months following November 1, 1976, plaintiff took no action whatever to prosecute her action. During all that time she was represented by her present attorney, who is her brother. Although the second Superior Court justice saw fit to restore the case to the docket in July, 1979, that ruling at most represented that justice's conclusion that plaintiff's failure to prosecute the action up to that point was not sufficiently blameworthy in itself to justify the ultimate sanction of dismissal. However, the justice's ruling merely restored the case to the docket (along with ordering the case to trial "as swiftly as practicable") and did not give plaintiff and her counsel a "pardon" for their past failure to exercise ordinary diligence in prosecuting the suit. Their unexplained failure to comply with the subsequently entered pretrial order, or even to come forward promptly with any showing that no documentation existed, if that was the fact, when added to their prior nonaction for well beyond the critical two-year period set by Rule 41(b)(1), could well be found to justify dismissal.

[6] We recognize that the sanction of dismissal, or of default judgment if imposed on a defendant, is a drastic one; its direct consequence falls not upon the attorney, but upon the party, who thereby loses all chance for an adjudication on the merits. For that reason, the ultimate sanction should be imposed only for the most serious instances of noncompliance wiht pretrial procedures. Mindful of that fact, we are nonetheless well satisfied that the special circumstances present in this case make

it an appropriate occasion for dismissal, in order to penalize a serious delinquency and to deter like conduct by others. *Cf. Zavala Santiago* v. *Gonzalez Rivera*, 553 F.2d 710, 713 (1st Cir. 1977) (Coffin, C. J.) (dismissal for failure to attend pretrial conference and comply with discovery order). The Superior Court justice did not commit any abuse of discretion by making that choice.

The entry must be:

Appeal denied.

Judgment of dismissal with prejudice affirmed.

All concurring.

Appendix G.

STATE OF MAINE
SUPREME JUDICIAL COURT SITTING AS
THE LAW COURT
LAW DOCKET NUMBER ARO-86-378

VAHLSING, INC. AND F.H. VAHLSING, JR.,
INDIVIDUALLY,
PLAINTIFFS,

VS.

BANGOR AND AROOSTOOK RAILROAD COMPANY AND
WILLIAM M. HOUSTON, INDIVIDUALLY,
DEFENDANTS.

APPEAL FROM THE SUPERIOR COURT, AROOSTOOK COUNTY.

Motion for Reconsideration.

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Received
March 30, 1987
Supreme Judicial Court

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MAINE SUPREME JUDICIAL COURT

Decision No. 4389

Law Docket No. Aro-86-378

VAHLSING, INC. ET AL,

v.

BANGOR AND AROOSTOOK RAILROAD CO. ET AL

MOTION FOR RECONSIDERATION

NOW COME the Appellants, Vahlsing, Inc. and F. H. Vahlsing, Jr., individually, pursuant to M.R.C.P. 76(b), and request this Honorable Court to reconsider the decision handed down on March 23, 1987 in this matter.

The issues which were presented to this Honorable Court were as follows:

ISSUE ONE:

Was it an abuse of the Court's discretion to dismiss with prejudice Plaintiffs' Amended Complaint?

ISSUE TWO:

Were the Orders issued by the Superior Court of Maine confusing and ambiguous?

Appellants did not present to this Honorable Court the issue of whether the Superior Court of Aroostook County had the power to render a sanction decision of dismissal with prejudice. What was presented to this Honorable Court is outlined in Issue One and Issue Two above, in that under the circumstances of confusing Orders and corresponding acts of Vahlsing, Inc. and F. H. Vahlsing, Jr., Appellants, pursuant to such confusing Orders as outlined in the Brief of Appellants dated December 22, 1986, Brief of Appellees dated January 21, 1987, and Reply Brief of Appellants dated February 1, 1987, and considering the circumstances of the acts of Appellants under the burden of confusing Orders and attempting to comply with

such confusing Orders, this Honorable Court was requested to determine whether the decision of the Superior Court was appropriate in dismissing the claims of Vahlsing, Inc. and F. H. Vahlsing, Jr. with prejudice.

Appellants questioned whether Appellants can be faulted with the extreme remedy of dismissal with prejudice under the circumstances of the confusing Orders. The Orders were confusing to Vahlsing, Inc. and F. H. Vahlsing, Jr., Appellants and such fact was reinforced by the Brief of Appellees dated January 21, 1987, which *misquoted* such confusing Orders as outlined in detail in Appellants' Reply Brief dated February 1, 1987.

In the decision rendered March 23, 1987 Appellants can find no reference of this Honorable Court to the matter of whether the Orders were indeed confusing, nor any reference that this Honorable Court addressed the actions of Appellants in the light of such confusing Orders or whether the Orders of the Superior Court of Aroostook County in this matter, specifically the Order of July 25, 1985 was confusing and how Appellants could be faulted in connection with their actions by a Summary Judgment with prejudice in complying with a confusing Order in accordance with their best interpretation of such Order.

Is it the position of this Honorable Court that a lower court can issue Orders which are confusing and thus affirm an extreme sanction of dismissal with prejudice against the Appellants, Vahlsing, Inc. and F.H. Vahlsing, Jr. for not complying with a confusing Order? Appellants believed that they complied with their interpretation of the confusing Order dated July 25, 1985 prior to the issuance by the Superior Court of Aroostook County of a second Order on March 18, 1986, which referred back to the confusing Order of July 25, 1985.

Is it to be the law of Maine that in the event a Superior Court issues a confusing Order on its very face and a party

believes it is following such confusing Order and thence the Superior Court does not agree with the party, that the Superior Court can issue an extreme sanction of dismissal with prejudice against that party for not following a confusing Order? Should not this Honorable Court address the issue of whether or not the Order of July 15, 1985 was confusing?

Appellants, Vahlsing, Inc. and F. H. Vahlsing, Jr. followed the confusing Order dated July 25, 1985 to the best of their ability and after being admonished for their interpretation of such confusing Order by a new Order dated March 18, 1986, which referred back to the confusing Order of July 25, 1985, appealed for clarification to this Honorable Court on April 15, 1986. *This Honorable Court refused to hear such appeal and such appeal was dismissed.* After such action, dismissal with prejudice was issued by the Superior Court of Aroostook County against Appellants, Vahlsing, Inc. and F. H. Vahlsing, Jr.

Whereupon, Appellants, Vahlsing, Inc. and F. H. Vahlsing, Jr., after dismissal with prejudice, *again* appealed to this Honorable Court. Relative to this second appeal, this Honorable Court accepted such appeal and handed down the ruling that the Superior Court had the power to issue a dismissal with prejudice. Appellants did not appeal the fact that the Superior Court of Maine has the power to issue a dismissal of a plaintiff's Complaint with prejudice. *That was not the issue before this Honorable Court.* The issues presented to this Honorable Court as set forth in Brief of Appellants dated December 22, 1986, page 7, were, and we herewith quote again:

ISSUE ONE:

Was it an abuse of the Court's discretion to dismiss with prejudice Plaintiffs' Amended Complaint?

ISSUE TWO:

Were the orders issued by the Superior Court of Maine confusing and ambiguous?

The above two issues are the essence of the appeal to this Honorable Court. There is very little, if any, disagreement concerning the facts of the matter as the Order of July 25, 1985 is of record, *although such Order was misquoted in Appellees' Brief* in an attempt by Appellees *to eliminate the confusion*. The Order of July 25, 1985 is a matter of record along with a subsequent Order *which referred to* the confusing Order of July 25, 1985. This Honorable Court is hereby requested to reconsider its decision of March 23, 1987, a copy of which is attached hereto as Exhibit A.

Respectfully submitted,

/s/ Bruce S. Billings

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Respectfully submitted,

/s/ F. H. Vahlsing, Jr.

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MAINE SUPREME JUDICIAL COURT Reporter of Decisions
Decision No. 4389
Law Docket No. Aro-86-378

VAHLSING, INC. et al,
v.
BANGOR AND AROOSTOOK RAILROAD CO. et al

Argued March 6, 1987
Decided March 23, 1987

Before NICHOLS, ROBERTS, and GLASSMAN, JJ.

MEMORANDUM OF DECISION

Vahlsing, Inc. and F.H. Vahlsing, Jr. appeal the dismissal of their complaint by the Superior Court, Aroostook County, for failure to comply with a court order. Reviewing the record in a light most favorable to the plaintiffs, we conclude that the dismissal of the plaintiffs' complaint was within the scope of the trial court's discretion. *See Reeves v. Travelers Insurance Companies*, 421 A.2d 47, 50-51 (Me. 1980).

The entry is:

Judgment affirmed.

All concurring,

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NOTICE: This opinion is subject to formal revision before publication in the Maine Reporter. Readers are requested to notify the Reporter of Decisions, Box 368, Portland, Me. 04112, of any typographical or other formal errors before the opinion goes to press.

CERTIFICATE OF SERVICE

We hereby certify that two copies of the Motion for Reconsideration were served via first class mail, postage prepaid, on the following on March 28, 1987:

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/s/ Bruce S. Billings

Bruce S. Billings, Esquire
Attorney for Vahlsing, Inc.

/s/ F. H. Vahlsing

F. H. Vahlsing, Jr., Pro Se

Appendix H.

STATE OF MAINE
AROOSTOOK, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. Aro-86-378

VAHLSING, INC., ET AL.]
]
vs.] ORDER
]
BANGOR AND AROOSTOOK]
RAILROAD CO., ET AL.]

Upon motion of appellants for reconsideration,

It is ORDERED that the motion be, and it hereby is, DENIED. The mandate shall issue forthwith.

Dated this thirty-first day of March, 1987.

For the Court,

/s/ D. Nichols

Associate Justice

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